83-1781

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES ANTHONY MICHAELS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

A.

DOES THE OPINION OF THE COURT OF APPEALS CONFLICT WITH OPINIONS OF THE COURTS OF APPEALS FOR THE SECOND AND TENTH CIRCUITS CONCERNING THE QUANTUM OF EVIDENCE NECESSARY TO BRING NONCOMMERCIAL PROPERTY WITHIN THE AMBIT OF TITLE 18, U.S.C. §844(i) WHICH PROHIBITS THE DESTRUCTION, BY MEANS OF AN EXPLOSIVE, OF PROPERTY USED IN AN ACTIVITY AFFECTING INTERSTATE COMMERCE?

B.

DOES THE OPINION OF THE COURT OF APPEALS REGARDING THE PETITIONER'S TESTIMONY AS CONSTITUTING A WAIVER OF HIS OBJECTION TO THE WARRANTLESS AND ILLEGAL SEIZURE OF FINGERPRINT EVICENCE EFFECTIVELY CARVE OUT A NEW CIRCUMVENTION OF THE FOURTH AMENDMENT WARRANT REQUIREMENT WHICH THIS COURT SHOULD REVIEW?

C.

SHOULD THIS COURT DETERMINE AND SPECIFY UNDER WHAT CIRCUMSTANCES ARGUMENT OF GOVERNMENT COUNSEL WHICH THE LOWER COURT FINDS TO BE "INAPPROPRIATE, UNRESPONSIVE TO DEFENSE COUNSEL'S ARGUMENT AND UNSUPPORTED BY THE EVIDENCE" WILL REQUIRE A MISTRIAL ON THE BASIS OF PROSECUTORIAL MISCONDUCT?

PARTIES

Petitioner, James Anthony Michaels, III was one of two defendants originally charged in a three count indictment in the United States District Court for the Eastern District of Missouri, Eastern Division. Both defendants were charged with (1) conspiracy to damage and destroy a vehicle allegedly used in an activity affecting interstate commerce, in violation of 18 U.S.C. §371 and 844(i), (2) making a destructive device without having made proper application therefor, in violation of 26 U.S.C. §5861(f) and 5871, and (3) destroying, by means of an explosive device, a vehicle used in an activity affecting interstate commerce, in violation of 12 U.S.C. §844(i) and 2. The other defendant, Milton Russell Schepp, had not been apprehended at the time of petitioner's trial and, consequently, petitioner was tried separately. He was found not guilty by the jury of the second and third counts alleged, but guilty of the conspiracy count. His co-defendant Schepp, was later tried and convicted of all three counts and his conviction is presently on appeal before the United States Court of Appeals for the Eighth Circuit.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, James Anthony Michaels, III prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit to review the judgment of the Court below entering judgment of conviction and sectencing petitioner to term of imprisonment of five years.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is appended hereto as Appendix A. The Order denying Petitioner's Petition for Rehearing is appended hereto as Appendix B. To petitioner's knowledge neither the opinion nor the Order have yet been reported.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on February 10, 1984, affirming Petitioner's Judgment and Sentence entered on December 3, 1982, after trial by jury. The United States Court of Appeals denied a timely motion for rehearing on March 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and United States Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner raises claims with regard to his rights under the Fourth Amendment to the United States Constitution: "The rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Petitioner also raises claims regarding the right of a defendant in a criminal case to testify in his own behalf as set out in Title 18, U.S.C. 3481 and claims pertaining to the application of the federal jurisdictional requirements of Title 18, U.S.C. §844(i). Sections 844(i) and 3481 of Title 18 are set forth in Appendix C.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to Title 18, U.S.C. §3221 for alleged violations of Title 18, U.S.C. §2, 371, 844(i) and Title 26, U.S.C. §5822, 5861(f) and 5871.

On August 11, 1981, an automobile registered in the name of one John Paul Leisure was damaged in an explosion and the occupant of the automobile, identified as Leisure, was injured.

Among the items seized by police at the bomb scene were the application for title to the vehicle in Leisure's name, bill of sale and application for service agreement which were found laying on the ground on the passenger side of the car. Also found, outside and at the rear of the car, was a briefcase which contained materials purporting to be a booklet of Laborers' Union Local 42 membership application forms, with Leisure's name on the front, Local 42 supplemental dues check-off forms and form contracts for use between Local 42 and other associations. (Tr. II, 24-27).

The Government's evidence idicated that a John Paul Leisure was employed by Local 42 as a field organizer (Tr. II, 46) and that Local 42 paid a "Leisure" $200.00 per month car allowance for the months of June, July and August, 1981. No further evidence was produced showing that "Leisure" actually used any privately owned automobile, or more specifically, the bombed automobile in connection with union business. John Paul Leisure was not called as witness and, consequently, did not testify as to his activities in connection with the privately owned automobile.

Based upon certain investigation, which included the warrantless search of a trash dumpster, but which is not in issue in this petition, federal agents obtained a warrant to search an apartment which the Government contended had been rented by petitioner for the purpose of manufacturing the explosive device used to destroy the automobile.

The warrant authorized a search for:

> "Component parts of a destructive device including, but not limited to, explosive residue, tape, wiring, metal clips, documents relating to the purchase of explosives and component parts of a destructive device."

None of the items listed in the warrant were found in the apartment. However, the executing agents proceeded to "dust"

the entire apartment and furniture located therein for fingerprints and found a print identified as that of petitioner on a table leg.

Prior to trial, petitioner filed his motion to suppress evidence directed to numerous items including "fingerprint evidence and physical evidence obtained from the person, property or alleged property of the defendant." (Motion, p. 1).

The motion specifically alleged that "physical evidence obtained from the apartment which defendant is alleged to have rented was obtained through illegal searches conducted without a properly issued warrant." (Motion, p. 1-2). The memoranda submitted in support of the motion to suppress evidence and filed on July 14, 1982, after pre-trial discovery, expanded on the objections to the use of the fingerprint evidence. Petitioner argued, in part as follows:

> (Memo, p. 18 and 19).
>
> "... it should be noted that pre-trial discovery has revealed that the search included the lifting of fingerprints from such places as table legs, a bathtub, kitchen sink and cabinets, bedroom doors, closet shelves and even the outside of the back screen door. Such hardly fits the search for component parts of a destructive device."
>
> "Finally, the search conducted of the apartment exceeded the scope of the warrant. The officer entered the apartment looking for component parts of a destructive device as listed in the affidavit and proceeded to search every corner and closet in the apartment including the places listed above."

Nevertheless the motion to suppress was denied and the fingerprint evidence was received in trial during the Government's case over the objection of petitioner.

Petitioner's motion for judgment of acquittal filed at the conclusion of the Government's case (also renewed at the conclu-

sion of all the evidence) was denied, and petitioner presented evidence in his defense including his own testimony acknowledging that he had been in the apartment, for a social occasion, but denying that he had rented it and denying any knowledge of any scheme to manufacture a destructive device or to destroy the automobile.

At the conclusion of the case, petitioner's counsel argued that the Government had failed to produce as witnesses, John Paul Leisure or his mother, who was allegedly present at the scene of the explosion. The United States Attorney in rebuttal commented as follows:

> "Please don't be mislead. Look at the evidence and look at it analytically. He asks why didn't we bring Paul Leisure in here, why didn't we bring Vernita Leisure in here.
>
> Ladies and gentlemen, Paul Leisure is a gangster. (Tr. VII, 70, 71)."

Petitioner objected to this comment and moved for a mistrial. Although the objection was sustained, the motion for mistrial was denied. (Tr. VII, 70-73).

The jury, thereafter deliberated some fourteen hours. As indicated, petitioner was found guilty on the conspiracy charge, but acquitted of the remaining charges.

On appeal, petitioner raised the issues concerning the application of 18 U.S.C. §844(i) to the destruction of a privately owned and operated automobile. He argued that under the evidence in this case, the opinions of the Court of Appeals for the Second and Tenth Circuits in *United States v. Monholland,* 607 F.2d 1311, 1314 (10th Cir. 1919) and *United States v. Mennuti,* 639 F.2d 107 (2nd Cir. 1981) should be applied to limit the application of 18 U.S.C. §844(i) to the destruction of business property or property clearly shown by the evidence to have been used in an activity affecting interstate commerce. The Court of Appeals rejected this argument asserting that the evidence pertain-

ing to the payment of an automobile allowance by the union coupled with the evidence that union related documents were found at the scene of the explosion was sufficient to establish federal jurisdiction under the commerce clause. (Op, p. 4).

Petitioner also argued that the search and seizure of the fingerprint evidence far exceeded the scope of the search warrant and should have been excluded. However, the Court of Appeals rejected this argument, apparently overlooking Petitioner's assertions in his pre-trial Motions and Memoranda, and concluding that the issue was not raised in his pre-trial motion the Court of Appeals further found that petitioner was not prejudiced because he testified on his own behalf and offered an innocent reason for being in the apartment. (Op, p. 11, 12).

Finally, although the Court of Appeals found the United States Attorney's reference to Leisure as "a gangster" to be "inappropriate, unresponsive to defendant's argument and unsupported by the evidence" (Op, p. 14), no error was found in the trial court's denial of a mistrial.

The Court of Appeals, therefore, affirmed the conviction and denied Petitioner's Motion for Rehearing.

REASONS FOR ALLOWING THE WRIT

A.

The Opinion Of The Court Of Appeals Conflicts With Opinions Of The Courts Of Appeals For The Second And Tenth Circuits Concerning The Quantum Of Evidence Necessary To Bring Noncommercial Property Within The Ambit Of Title 18, U.S.C. §844(i) Prohibiting The Destruction, By Means Of An Explosive, Of Property Used In An Activity Affecting Interstate Commerce.

Section 844(i) provides, in pertinent part, as follows:

> (i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any

> building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . . .

The connection between the target property and its use in interstate commerce or in an activity affecting interstate commerce is obviously an essential element for either a substantive or conspiracy violation of §844(i). *United States v. Monholland,* 607 F.2d 1311, 1314 (10th Cir. 1979); *United States v. Mennuti,* 487 F.Supp. 539, 643 (E.D. N.Y. 1980); *aff'd.,* 639 F.2d 107 (2nd Cir. 1981).

Admittedly, the legislative history of §844 indicates that the statute was intended to have "the fullest jurisdictional breadth permissible under the Commerce Clause" 1970 U.S. Code Cong. & Admin. News at 4007, 4046, House Report No. 91-1549, Organized Crime Control Act of 1970; *United States v. Sweet,* 548 F.2d 198, 200 (7th Cir. 1977), *cert. denied,* 430 U.S. 969, 97 S.Ct. 1653, 52 L.Ed. 2d 361 (1977); *United States v. Mennuti, supra,* 487 F.Supp. at 451, 539 F.2d at 111. Thus, the history of the statute notes that it covers substantially all *business property.* 1970 U.S. Code Cong. & Admin. News at 4046 (emphasis added).

However, in the reported decisions involving §844(i) prosecutions, a relatively clear trend emerges among the Circuit and District Courts: when the property in question is plainly shown to be business or commercial property, even a *de minimis* connection with interstate commerce will be held sufficient to support federal jurisdiction. *United States v. Sweet,* 548 F.2d 198, 200-02 (7th Cir. 1977); *United States v. Schwanke,* 598 F.2d 575 (10th Cir. 1979); *United States v. Grossman,* 608 F.2d 534, 537 (4th Cir. 1979); *United States v. Keen,* 508 F.2d 986 (9th Cir. 1974); *United States v. Barton,* 647 F.2d 224, 231-22 (2nd Cir. 1981); *United States v. Nashawty,* 571 F.2d 71 (1st Cir. 1978); *United States v. Corbo,* 555 F.2d 1279 (5th Cir. 1977); *United States v. Parker,* 586 F.2d 422 (5th Cir. 1978); *United States v. Andrini,* 685 F.2d 1094, 1095-96 (9th Cir. 1982).

On the other hand, when the property in question is essentially private, jurisdiction is not established simply because the property may have some minimal interstate contacts or may have been used to transport an individual to or from a place of business. *United States v. Mennuti, supra; United States v. Monholland, supra.*

Neither the Court of Appeals below nor the Government has cited a single case in which a prosecution was sustained under section 844(i) for the destruction of noncommercial property.

As Judge Friendly pointed out in affirming the dismissal of the indictment in *United States v. Mennuti, supra,* Section 844 rests solely upon the commerce clause, and a commerce *use* must be clearly demonstrated to sustain federal jurisdiction under the clear language of the statute. Judge Friendly concluded:

> "WE are not holding that Congress could not, with appropriate findings and language, make it a federal crime to do what appellees were charged with doing here. *We hold only that Congress did not choose, as the Government contends, to make nearly every bombing in the country a federal offense;* it limited its reach to property currently *used* in commerce or in an activity affecting it, leaving other cases to enforcement by the states (639 F.2d at 113). (Emphasis supplied)."

In *Mennuti,* the defendants were accused of bombing two private residences in an arson for profit scheme. The Government sought to establish the requisite connection between the property and interstate commerce by showing that components of the houses had been in interstate commerce, that gas and oil for heating and cooking had originated out of state, and that the houses were insured by out-of-state insurers. The District Court found that the above factors were insufficient to establish the requisite connection between the property and interstate commerce. The Second Circuit affirmed. Both Courts focused

on the essentially private nature of the properties in holding that the property involved must be shown to clearly have a relationship to commerce. The factors listed above, including the interstate insurance contracts, were simply not sufficient to draw the property into the interstate commerce framework.

United States v. Monholland, supra, is, factually, the most closely analagous case to the case at bar. The defendants in *Monholland* were charged under §844(i) with conspiring to blow up a pickup truck owned by a state court judge. The object of the plot was to kill the judge. The evidence disclosed that the judge used the truck to drive from his home to the courthouse. He also used the truck to travel to other courthouses in his circuit, all of which took place within the State of Oklahoma, traveling on the United States highway system.

As in the case at bar, no evidence was adduced that the truck itself was used in interstate commerce or that it traveled in interstate commerce. 607 F.2d at 1314-1315. The judge, however, testified that cases over which he presided had various interstate connections: interstate divorce cases, fugitive warrants, possession of stolen automobiles transported across state lines and the like.

The Court of Appeals for the Tenth Circuit held that the Government had failed to prove the requisite nexus between the truck and the allegedly interstate activities of the judge when he was presiding over cases in court.

The Court of Appeals in the instant case acknowledged that it had "not previously dealt with a sufficiency of the evidence question with repect to the commerce requirement of §844(i)" (Op, p. 2), but indicated that it would be guided by the decisions of its sister circuits which "have broadly construed the requirement that the 'target property' be used in an activity affecting interstate commerce." However, the opinions cited by the Court all pertained to commercial property, not to privately owned and privately used property as is involved in the instant case.

If, in fact, an automobile, under the facts proven in this case can be the subject of a prosecution under §844(i) then, indeed, Judge Friendly's observation that Congress did not choose to make every bombing in the Country a federal offense (*Mennuti, supra,* p. 113) is surely contradicted. In view of the conflict of authority in this area, therefore, this Court should issue its Writ of Certiorari to review this federal jurisdictional issue.

B.

The Opinion Of The Court Of Appeals Regarding The Petitioner's Testimony As Constituting A Waiver Of His Objection To The Warrantless And Illegal Seizure Of Fingerprint Evidence Effectively Carves Out A New Circumvention Of The Fourth Amendment Warrant Requirement Which This Court Should Review.

In the instant case, the evidence that petitioner's fingerprint was found in the apartment alleged to be the crime scene was the only evidence presented by the Government that the petitioner was ever in the apartment. Petitioner sought to have this evidence excluded because the fingerprints were obtained without the authorization of a search warrant. His motion to suppress evidence having been overruled and the fingerprint evidence having been presented to the jury, he elected to testify as to his reasons for being present in the apartment, which reasons were consistant with his innocence. The Court of Appeals, did not address the issue of the illegal search, but found that petitioner was not prejudiced because he testified.[1]

If the opinion of the Court of Appeals is to be the law, therefore, petitioner and others in the same position will be given a Hobson's choice when confronted with illegally seized evidence for which they may have an innocent explanation.

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[1] The Court also found, incorrectly, that petitioner had not raised this issue in his pre-trial motions (see motions quoted on p. 4 of this petition).

They may litigate the issue of illegally seized evidence without providing a possible explanation as to its existence, or they may testify as to the explanation and waive any further right to contest the search. The assertion of a right guaranteed by the Fourth amendment should not be predicated on a defendant's waiver of his right to testify guaranteed by the Fifth and Sixth Amendments and Title 18, U.S.C. §3481. See, *United States v. Bifield,* 702 F.2d 342, 347-350 (2nd Cir. 1983) recognizing the constitutional right of a defendant to testify.

Putting the principle advanced by the Court of Appeals in another context, an individual who is illegally stopped and searched for contraband will waive the right to contest that search on appeal if his motion to suppress is denied by the trial court and he thereafter testifies to an innocent explanation for possession of the contraband.

It has long been the law that the scope of a search pursuant to a warrant is limited to the items specified in the warrant. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Walter v. United States,* 447 U.S. 649, 656 (1980); *United States v. Anderson,* 553 F.2d 1210 (D.C. Cir. 1976); *United States v. Hare,* 589 F.2d 1291 (6th Cir. 1979). Absent consent or exigent circumstances, neither of which existed herein, "no amount of probable cause can justify a warrantless seizure" of items not described in the warrant. (*Coolidge, supra* at 450).

In the instant case, an entire private residence was dusted for fingerprints ostensibly upon authority of a search warrant authorizing the search for "components of a destructive device", none of which were found.

The Court of Appeals elected not to address the attendant Fourth Amendment violation, but found that the petitioner's objections had been waived by his own testimony. This Court should issue its Writ of Certiorari to determine if, in fact, such a waiver will be recognized.

C.

This Court Should Determine Under What Circumstances Argument Of Government Counsel Which The Court Finds To Be "Inappropriate, Unresponsive To Defense Counsel's Argument And Unsupported By The Evidence" Will Require A Mistrial On The Basis Of Prosecutorial Misconduct.

In the context of this prosecution, the United States' attorney's comment that the victim, Paul Leisure, "is a gangster" was particularly prejudicial. Throughout the trial, and over petitioner's continuing objections, the Government sought to establish that petitioner, who had no previous criminal record, was motivated to participate in the alleged conspiracy as retaliation for the bombing death of his grandfather. Despite the fact that there was no evidence produced that Leisure was in any way connected with or responsible for the death of the grandfather, or, for that matter, was involved in any criminal activity, the Government was permitted to argue that petitioner had a motive to harm Leisure. The United States' attorney's comment effectively filled in the gap left in the Government's evidence. The jury was simply told by the United States' attorney that Paul Leisure was "a gangster".

Although the trial judge did instruct the jury to disregard the comment, it is ludicrous to believe that during its fourteen hours of deliberation this comment did not have a substantial influence on the jury.

Long ago, this Court, in reversing a conviction because of improper argument of Government counsel, set out the oft quoted rationale and standard for reviewing such conduct. In *Berger v. United States,* 295 U.S. 78, 88 (1934) the Court stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

> therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The Court went on to say:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

The Court of Appeals, while recognizing the impropriety of the remark referred to, declined to reverse the conviction "because of the prompt remedial action taken by the district court and relatively strong evidence," citing its own decision in *United States v. Auerbach,* 682 F.2d 735 (8th Cir. 1982). (Op, p. 15). The fact that the jury deliberated fourteen hours was, surprisingly, found as a factor militating against reversal and the fact that the petitioner was acquitted of two of the three counts with which he was charged was ignored in the Court's assessment of the evidence as "strong".

Surely there must be a limit to the conduct of prosecutors in making such improper argument to the jury and there must be a recognition of the fact that instructions of the court cannot, in every instance, remedy the prejudicial impact of such argument. Petitioner submits that guidance is again needed from this Court to delineate the acceptable parameters of prosecutorial

conduct. See e.g.: *Donnelly v. De Christoforo,* 416 U.S. 637, 642 (1974). The Court should, therefore, issue its Writ of Certiorari.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2496

United States of America,
Appellee,

v.

James Anthony Michaels, III,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: September 12, 1983
Filed: February 10, 1984

Before BRIGHT, ARNOLD and FAGG, Circuit Judges.

FAGG, Circuit Judge.

James Anthony Michaels appeals from his jury conviction for conspiracy to bomb an automobile in violation of 18 U.S.C. § 844(i). Michaels initially challenges the existence of federal jurisdiction. He claims that the government has not sufficiently established that the vehicle bombed was used in an activity affecting interstate commerce. Michaels also argues that the trial court committed error in (1) refusing to enter a judgment of acquittal in that the evidence presented was insufficient to establish Michael's participation in a conspiracy to bomb Paul

Leisure's automobile; (2) admitting evidence seized from a trash bin, an apartment, and a storage locker; (3) admitting evidence of a prior car bombing in which Michael's grandfather was killed; and (4) refusing to declare a mistrial when the government, during closing argument, referred to the bombing victim as a gangster. We find Michaels' contentions to be without merit, and thus affirm the judgment of the district court.

I. Jurisdiction

Michaels initially contends that federal jurisdiction is lacking under 18 U.S.C. § 844(i). Section 844(i) provides:

> (i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned * * *.

Michaels argues that the government did not sufficiently establish that the vehicle bombed, i.e., Leisure's privately-owned Cadillac automobile, was being used to conduct union business that affected interstate commerce. We cannot agree.

Although this court has not previously dealt with a sufficiency of the evidence question with respect to the commerce requirement of section 844(i), we are guided by the decisions of our sister circuits. Sister circuits have broadly construed the requirement that the "target property" be used in an activity affecting interstate commerce. *United States v. Andrini,* 685 F.2d 1094, 1095-96 (9th Cir. 1982); *United States v. Barton,* 647 F.2d 224, 231-33 (2d Cir.), *cert. denied,* 454 U.S. 857 (1981); *United States v. Grossman,* 608 F.2d 534, 537 (4th Cir. 1979); *United States v. Schwanke,* 598 F.2d 575, 577-78 (10th Cir. 1979); *United States v. Sweet,* 548 F.2d 198, 200-02 (7th Cir.), *cert. denied,* 430 U.S. 969 (1977). Following the directive of the statute's legislative history, the courts have readily applied section 844(i) to business-related property used in an activity affec-

ting interstate commerce. H.R. Rep. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4046-47. We, too, broadly construe the language of section 844(i).

The government's uncontradicted evidence sufficiently demonstrates that the Cadillac automobile was used by Leisure to conduct union business. Irene Jones, an employee of Laborers International Union, Local No. 42, testified that Paul Leisure was employed by the union as a field organizer. In this capacity, Leisure traveled to various job sites for the purpose of enrolling new members in the union and collecting money owed the union by current members. The union paid Leisure a $200 per month allowance as reimbursement for using his personal automobile to conduct union business. Clearly, use of the automobile was an integral and necessary part of Leisure's job assignment and was not merely a means of traveling to and from work. *Cf. United States v. Monholland,* 607 F.2d 1311, 1314-16 (10th Cir. 1979) (pickup truck used by state court judge to travel back and forth from home to court did not affect commerce).

Michaels argues that even assuming Leisure used a personally-owned automobile to conduct union business, there was no evidence to demonstrate that Leisure's Cadillac automobile was used for that purpose. Evidence obtained at the bomb scene, however, dictates a contrary conclusion. An agent of the Bureau of Alcohol, Tobacco and Firearms testified that upon his arrival at the bomb scene, he took custody of a briefcase that was lying to the left rear of Leisure's Cadillac. The briefcase contained numerous forms relating to the business of Laborers Local 42: a booklet containing membership application forms with Paul Leisure's name on the outside; a receipt book for recording collection of money from union members; dues check-off forms which authorize the union to deduct dues directly from a member's paycheck; and finally, numerous booklets containing agreements that Local 42 has with other organizations and associations.

The government's uncontradicted evidence also sufficiently demonstrates that the business Leisure accomplished by use of the Cadillac automobile affected interstate commerce. Laborers Local 42 had substantial dealings with the International Union office in Washington, D.C. Equipped with membership application forms, a cash receipt book, and dues check-off forms, Leisure used the Cadillac automobile to travel to job sites for the purpose of enrolling new members in the union and collecting money owed the union by its members. Laborers Local 42, in turn, provided the International Union with a listing of new members for initiation purposes and paid the International Union a monthly per capita tax on its members. While the effect on interstate commerce accomplished through Leisure's use of the automobile may seem slight, "his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942). We believe that the government has sufficiently connected the automobile to an activity affecting interstate commerce, as required by section 844(i).

II. Sufficiency of the Evidence

Maintaining that the evidence presented at trial was not sufficient to establish his knowing participation in a conspiracy to bomb Paul Leisure's automobile, Michaels argues that the district court committed error in refusing to enter a judgment of acquittal. To convict a defendant of criminal conspiracy, the government is obligated to prove that "the individual entered an agreement with at least one other person, that the agreement had as its objective a violation of the law, and that one of those in agreement committed an act in furtherance of the objective." *United States v. Evans,* 697 F.2d 240, 244-45 (8th Cir.), *cert. denied,* 103 S. Ct. 1779 (1983). The only element of a criminal conspiracy at issue on this appeal is Michaels' conspiratorial membership. "[T]he law in this Circuit is quite clear that an individual becomes a member of a conspiracy when the person knowingly contributes his or her efforts in furtherance of the

objectives of the conspiracy...." *United States v. Burchinal,* 657 F.2d 985, 990 (8th Cir.), *cert. denied,* 454 U.S. 1086 (1981). Further, "once the government has established the existence of a conspiracy, even slight evidence connecting a particular defendant to the conspiracy may be substantial and therefore sufficient proof of the defendant's involvement in the scheme." *United States v. Overshon,* 494 F.2d 894, 896 (8th Cir.), *cert. denied,* 419 U.S. 853 (1974).

In reviewing the sufficiency of the evidence underlying Michaels' conviction, we are obligated to view the evidence in the light most favorable to the jury verdict, accepting as established all reasonable inferences tending to support the verdict rendered. *United States v. Jackson,* 714 F.2d 809, 812 (8th Cir. 1983); *United States v. Pruitt,* 702 F.2d 152, 155 (8th Cir. 1983). Finally, circumstantial evidence is no less probative than direct evidence and a conviction based solely on circumstantial evidence is subject to the same principles of review. *United States v. Jackson,* 549 F.2d 517, 530 (8th Cir. 1977).

Our review of the record reveals a substantial amount of circumstantial evidence from which a reasonable jury could have found beyond a reasonable doubt that Michaels knowingly participated in a conspiracy to bomb Leisure's automobile. *United States v. Brim,* 630 F.2d 1307, 1311 (8th Cir. 1980), *cert. denied,* 452 U.S. 966 (1981). In March of 1981, Milton Schepp gave Norman Steibel $3500 to purchase two cars. After registering the Chevrolet and Ford purchased by him in fictitious names, as directed by Schepp, Steibel turned the cars over to Schepp. In April 1981, Michaels contacted William Albright and requested that he rent an apartment for Michaels using a fictitious name. Michaels provided Albright $1100 cash to pay the rent six months in advance. Albright rented an apartment at 2706 Arnold Tenbrook in the name of Robert C. Simmons and then gave the apartment key to Michaels.

Testimony established that during the spring and summer of 1981, both cars purchased for Schepp, a car bearing Schepp's

personalized license plate, and a car registered to John Michaels, the appellant's brother, were seen parked in front of the apartment rented for Michaels. David Valdez, who lived approximately a block away from the bomb scene, testified that on the morning of the bombing, he noticed two men sitting in a green Chevrolet in front of his home. Their behavior raised his suspicions and because he did not recognize the car or the two men in it, Valdez made note of the vehicle's license number. The car that Valdez saw was the Chevrolet purchased by Steibel for Milton Schepp and the same car that had been seen parked in front of Michaels' apartment on numerous occasions. Testimony at trial indicated that the bomb was set off by a remote control device.

After the bombing, agents of the Bureau of Alcohol, Tobacco and Firearms, who were aware of the fact that the car near the bomb scene had also been seen at the Tenbrook Terrace apartments, searched a communal trash bin located on the apartment grounds. Located within the bin were two brown plastic trash bags, each containing a white plastic trash bag. Among the items contained in the first plastic bag were: a spoon with explosive residue adhering to it; surgical gloves; alligator clips; duct tape; an electronic connector; a piece of wire; and finally, some pieces of styrofoam which when fitted together resembled packaging for an electronic remote control device. Among the items contained in the second plastic bag were: surgical gloves of the same variety found in the first plastic bag; a magazine on which was left a fingerprint of the appellant Michaels and upon which was drawn a diagram that resembled the neighborhood surrounding the bomb scene; a letter and phone bill addressed to 2706 Arnold Tenbrook; and finally, a white cap with blue trim that resembled the hat David Valdez described as being worn by the driver of the car parked outside his house on the day of the bombing.

In June of 1981, Albright rented a large storage locker in Fenton, Missouri. When Albright was finished using the locker,

Michaels offered to pay for its continued rental if Albright would allow him to use it. Albright agreed and continued to pay A-Storage Inn for the rental of the locker and Michaels in turn reimbursed Albright. After the bombing, agents obtained a search warrant for the storage area. Located within the locker was the Ford automobile that had been purchased by Steibel for Schepp.

Following the bombing on August 11, Albright, having heard that law enforcement officials suspected he was connected with the rental of the apartment at 2706 Arnold Tenbrook, contacted Michaels to set up a meeting. Albright testified that upon meeting with Michaels, Michaels commented, "Boy, they are fast," and then reassured him that the apartment "had been wiped clean" and that "there was nothing there." After being contacted by the FBI, Albright again arranged a meeting with Michaels. At the second meeting, Albright testified that Michaels told him to "keep quiet," to "just not know anything" and to remain calm because Michaels' sources in the city said the police are "just fishing."

Upon reviewing the record, we find the evidence sufficient to sustain Michaels' conviction for conspiracy to bomb Paul Leisure's automobile.

III. Search of the Trash Bin, Apartment and Storage Locker

Agents of the Bureau of Alcohol, Tobacco and Firearms searched a trash bin located on the Tenbrook Terrace apartment grounds. Michaels, claiming a legitimate expectation of privacy in the contents of the garbage bags placed in the bin, argues that the warrantless search of the bags violated his fourth amendment right against unreasonable searches and seizures. *Rakas v. Illinois,* 439 U.S. 128, 143 (1978) (citing *Katz v. United States,* 389 U.S. 347, 353 (1967)). We disagree.

Tenbrook Terrace is a sixteen-unit complex consisting of four one-story ranch style buildings all sitting parallel to a drive that

runs the full length of the complex. There are four apartments in each building, and the area immediately in front of the buildings is paved for parking. The trash bin sits approximately a block from the entrance to the apartments and at the opposite end of the drive. Apartment 2706 is located within the apartment building nearest the entrance, thus the other three apartment buildings separate apartment 2706 from the bin. The bin, located in a wholly open area accessible to all of the tenants, their guests, and invited and uninvited visitors, is fully visible, unlocked, unfenced, and unrestricted in its use by any posted signs. It could not reasonably be claimed that the bin is situated within a zone of privacy connected with the living units, lawns, or recreational areas of the complex.

Those circuits that have considered the issue of whether a person has legitimate expectation of privacy in trash placed for collection in a public area, in close proximity to a public way, or in an outdoors communal trash container serving an apartment building, have consistently denied fourth amendment relief. *See United States v. Kramer,* 711 F.2d 789, 791-94 (7th Cir.), *cert. denied,* 104 S.Ct. 397 (1983) (trash bags removed by investigators from just inside knee-high fence running along street curb); *United States v. Terry,* 702 F.2d 299, 308-09 (2d Cir.), *cert. denied,* 103 S. Ct. 2095 (1983) (trash bags placed on public sidewalk adjacent to apartment); *United States v. Biondich,* 652 F.2d 743, 744-45 (8th Cir.), *cert. denied,* 454 U.S. 975 (1981) (trash placed in cans near the alley of Biondich's house for collection by a private garbage hauling service); *United States v. Reicherter,* 647 F.2d 397, 398-99 (3d Cir. 1981) (trash placed in an area outside of fence surrounding Reicherter's property and in an area accessible to the public and used by the public for walking); *United States v. Vahalik,* 606 F.2d 99, 100-01 (5th Cir. 1979), *cert. denied,* 444 U.S. 1081 (1980) (trash bags placed at edge of the street in front of Vahalik's home for collection); *United States v. Shelby,* 573 F.2d 971, 973-74 (7th Cir.), *cert. denied,* 439 U.S. 841 (1978) (at direction of the FBI, garbage

men collected and searched through trash placed in cans located behind Shelby's garage and immediately inside a low fence adjoining public alley; *Magda v. Benson,* 536 F.2d 111, 112-13 (6th Cir. 1976) (postal inspectors searched trash bags placed on the tree lawn adjacent to Magda's residence); *United States v. Mustone,* 469 F.2d 970, 972-73 (1st Cir. 1972) (trash bags placed on public sidewalk several doors away from premises); *United States v. Dzialak, 441 F.2d 212, 214-15 (2d Cir.), cert. denied,* 404 U.S. 883 (1971) (security investigator searched trash placed in area between street and sidewalk of Dzialak's home); *United States v. Minker,* 312 F.2d 632, 634-35 (3d Cir. 1962) (agents, with cooperation from garbage collector, examined contents of trash placed in a communal bin located outside apartment building). As stated by the court in *Reicherter, supra,* 647 F.2d at 399,

> Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was not reasonable.

We have no trouble concluding that the trash from Michaels' apartment was placed for collection within the framework of the cited authorities. The trash bin, being the designated pick-up point for scheduled semi-weekly garbage collection, was sitting in an open, unsecured area nearly a block away from Michaels' apartment. The trash bags, when placed in the bin, were intermingled with the trash of others, and there was no indication that special arrangements were made for the disposition of any individual tenant's trash. Although Michaels may have believed that the evidence of the crime was safe from inspection by others and would be conveniently disposed of by the garbage collectors, his beliefs were not reasonable. *Shelby, supra,* 573 F.2d at 973-74. Other tenants, guests, and visitors, perhaps curious about the contents of the trash within, could

easily have rummaged through the bin. The evidence permits no other conclusion than that Michaels had no legitimate expectation of privacy in the contents of the garbage bags placed in the trash bin.

Michaels also claims that the district court committed error in denying his motion to suppress evidence obtained during a search of the apartment at 2706 Arnold Tenbrook and of the storage locker located in Fenton, Missouri. Challenging the sufficiency of the affidavits submitted in support of the search warrant applications, Michaels argues that they fail to support a probable cause determination that components of a destructive device would be discovered.

Under the "totality of the circumstances" approach adopted by the Supreme Court in *Illinois v. Gates,* an issuing magistrate is "simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Illinois v. Gates,* 103 S. Ct. 2317, 2332 (1983) (quoting *Jones v. United States,* 362 U.S. 257, 271 (1960)); *United States v. Doty,* 714 F.2d 761, 763 (8th cir. 1983) (quoting *Illinois v. Gates, supra,* 103 S. Ct. at 2332).

We conclude, without hesitation, that the affidavits submitted in this case provided a substantial basis for the magistrate's finding of probable cause. Having reviewed the evidence in connection with our determination regarding its sufficiency to support Michaels' conspiracy conviction, we find it unnecessary to reiterate it. We only note that although not all of the evidence previously described was presented to the magistrate prior to his issuance of the search warrants for the apartment and storage locker, a substantial portion of the crucial evidence was available to him. Additionally, search warrant affidavits

provided information that an individual carrying a transmitter type device with an extended antenna was seen entering apartment 2706 prior to the day of the bombing. On the basis of the information he was provided, we hold that the magistrate reasonably concluded that there was a fair probability that components of a destructive device would be located in the apartment and storage locker.

Michaels further argues that a reversal is warranted because the scope of the apartment search far exceeded that authorized by the warrant. The warrant authorized agents to search the apartment for components of a destructive device. Agents dusted the apartment for fingerprints and positively identified a fingerprint on a table leg as being that of Michaels.

Michaels' contentions with respect to the scope of the search were not raised in his pretrial motion to suppress evidence. Although we are not obliged to address the issue, we note that Michaels can hardly claim prejudicial error from the introduction of the fingerprint evidence. Because Michaels testified that he visited William Albright at 2706 Arnold Tenbrook on numerous occasions, the introduction of fingerprint evidence that also places him there is entirely consistent with his explanation of an innocent reason for being in the apartment.

Lastly, Michaels argues that the government failed to lay a proper foundation for the introduction of the magazine upon which he left his fingerprint and upon which was drawn a map resembling the neighborhood surrounding the bomb scene. At trial, Michaels objected to the admission of the magazine on the ground that the government failed "to lay a proper foundation" for its exhibit. On appeal, he now complains of the trial court's ruling by urging specific grounds that were not mentioned when the objection was made. Michaels is precluded from asserting these grounds on appeal. Foundation objections require specificity. *United States v. Wagoner,* 713 F.2d 1371, 1377 (8th Cir. 1983). "Reversal is not required with regard to alleged improper admission of exhibits without specific founda-

tion, in the absence of a specific objection on foundation grounds." *United States v. Willis,* 482 F.2d 1034, 1040 (8th Cir.), *cert. denied,* 414 U.S. 1112 (1973). In any event, given the nature of the magazine offered into evidence, the circumstances surrounding its preservation and custody, and the unlikelihood of tampering, the district court did not err in determining that the evidence sufficiently established a chain of custody and admitted the challenged evidence. *See United States v. Brown,* 482 F.2d 1226 (8th Cir. 1973).

IV. Evidence of Prior Bombings

Michaels contends that evidence of the September 1980 car bombing death of his grandfather, James Michaels, Sr., was irrelevant or alternatively, if the evidence was at all probative, it was too prejudicial to be admitted. We disagree.

Although Michaels challenged its truth, testimony at trial indicated that subsequent to his grandfather's death, Michaels stated that "somebody was going to have to pay for this" and he further stated that if he found out who was responsible for his grandfather's death, he would not tell the police. The government was obligated to prove that Michaels was a member of the conspiracy to bomb Paul Leisure's automobile. Thus, evidence providing a motive for the subsequent bombing was relevant to proving Michaels' participation in the conspiracy. *See United States v. Mennuti,* 679 F.2d 1032, 1037 (2d Cir. 1982); *United States v. Hammond,* 642 F.2d 248, 249-50 (8th Cir. 1981).

Rule 403 of the Federal Rules of Evidence allows a trial court, in its discretion, to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. A district court's determination respecting the admissibility of evidence under Rule 403 is paid great deference, *United States v. Boykin,* 679 F.2d 1240, 1244 (8th Cir. 1982), and its determination will not be reversed on appeal "absent a clear and prejudicial abuse of discretion." *Wade v. Haynes,*

663 F.2d 778, 783 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade,* 103 S. Ct. 1625 (1983). We cannot say that the district court abused its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Prejudice to the defendant, if any, was minimal because there was no suggestion that Michaels was involved with the prior bombing and the details of the prior bombing were not delved into. While Rule 403 protects against evidence that is unfairly prejudicial in that it tends to suggest decision on an improper basis, the rule does not protect against evidence that is prejudicial merely in the sense that it is detrimental to a party's case. *Id.*

V. Closing Argument Comment

As his final contention on appeal, Michaels argues that the district court committed error in refusing to declare a mistrial after the government's attorney, during closing argument, referred to the bombing victim as "a gangster." The government contends that the reference was a direct response to defense counsel's closing comments respecting the failure of the government to call Paul Leisure as a witness.

The district court was faced with determing whether the comment complained of, when viewed in the context of the entire trial, "was so offensive as to deprive the defendant of a fair trial." *United States v. Auerbach,* 682 F.2d 735, 739 (8th Cir.), *cert. denied,* 103 S. Ct. 219 (1982) (quoting *United States v. Bohr,* 581 F.2d 1294, 1301 (8th Cir.), *cert. denied,* 439 U.S. 958 (1978)). "[A] trial court has broad discretion in controlling closing arguments. Absent a showing of abuse of discretion this court will not reverse." *United States v. Bohr, supra,* 581 F.2d at 1301.

Although the reference to Paul Leisure as "a gangster" was inappropriate, unresponsive to defense counsel's argument, and unsupported by the evidence, we cannot conclude that the

district court abused its discretion in refusing to declare a mistrial. Initially, we note that there is no "per se" rule that the mentioning of organized crime renders a trial unfair. *United States v. Varsalona,* 710 F.2d 418, 420 (8th Cir. 1983). Counsel's gangster comment was not made in referrence to defendant Michaels but rather referred to the victim of the bombing. The district court promptly sustained defense counsel's objection to the comment and further admonished the jury to disregard the comment in its totality. Approximately fourteen hours of deliberations indicates that the jury carefully assessed the evidence and fairly rendered a verdict. While we in no way approve of the comment made, we affirm "because of the prompt remedial action taken by the district court and relatively strong evidence." *United States v. Auerbach, supra,* 682 F.2d at 740.

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2496-EM September Term, 1983

United States of America,
Appellee,

vs.

Milton Russell Schepp
James Anthony Michaels, III,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellant's petition for rehearing or, alternatively, suggestions in support of rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing or, alternatively, suggestions in support of rehearing en banc denied.

March 6, 1984

APPENDIX C

18 U.S.C. §844

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more that $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

18 U.S.C. §3481.

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession, or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

No. 83-1781

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES ANTHONY MICHAELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Constitution and statutes:

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was insufficient evidence to link the automobile he was convicted of conspiring to destroy to an activity affecting interstate commerce; that a fingerprint discovered during a search of an apartment should have been suppressed because the scope of the search exceeded that authorized by the warrant; and that the district court abused its discretion by failing to declare a mistrial following an improper remark during the prosecutor's closing argument.

1. After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of conspiring to damage and destroy a vehicle used in an activity affecting interstate commerce, in

violation of 18 U.S.C. 371 and 844(i).[1] He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A1-A14) in an opinion reported at 726 F.2d 1307.

The evidence at trial, the sufficiency of which is not in dispute except with respect to the jurisdictional issue, showed that in 1981 petitioner conspired with co-defendant Milton Schepp and others to injure Paul Leisure, a field organizer for Local 42 of the Laborer's International Union. Leisure was seriously hurt on August 11, 1981, when a bomb destroyed the automobile he was driving.

2. The court of appeals correctly rejected petitioner's fact-bound contentions in a decision that does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore unwarranted.

a. Petitioner argues (Pet. 6-10) that Leisure's car had an insufficient nexus to an activity affecting interstate commerce within the meaning of Section 844(i) because it was used merely as transportation between assignments and not for any commercial purpose. The court of appeals found, however, that the "uncontradicted evidence sufficiently demonstrates that the Cadillac automobile was used by Leisure *to conduct union business*" (Pet. App. A3 (emphasis added)). Leisure was a union organizer who was required to travel to different job sites to enroll new union members and to collect dues from current members.[2] He was

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[1]Petitioner was acquitted on a substantive count under Section 844(i) and on a charge of making an illegal destructive device in violation of 26 U.S.C. 5861(f). A co-defendant, Milton Schepp, was a fugitive at the time of petitioner's trial; he has since been apprehended, tried, and convicted on all three counts. His appeal is pending.

[2]The union's activities indisputably affect interstate commerce (Pet. App. A4).

reimbursed $200 per month by the union for use of his automobile on this business. Membership applications, dues receipts, and other union forms were found in the car after it had been bombed. Use of the automobile accordingly "was an integral and necessary part of Leisure's job assignment and was not merely a means of traveling to and from work." *Ibid. United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979), relied on by petitioner, is inapposite because the vehicle in question there was used simply to drive to and from work, not as an integral part of the job itself (see *id.* at 1316).[3]

b. Petitioner argues (Pet. 10-11) that his fingerprint, found on a table leg during the search of an apartment apparently used to plan the bombing, should have been suppressed because the scope of the search exceeded that

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[3] *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), is similarly inapposite because the private dwellings that were destroyed were not used in connection with commercial activities.

The decision in the instant case is in accord with decisions of other courts of appeals holding that a minimal effect on commerce suffices under the statute. See, *e.g.*, *United States* v. *Andrini*, 685 F.2d 1094 (9th Cir. 1982) (target building constructed of out-of-state materials); *United States* v. *Barton*, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981) (damaged buildings housed illegal gambling businesses where food and drink served, some of which originated in another state; fuel for heat and lights also originated out-of-state); *United States* v. *Grossman*, 608 F.2d 534 (4th Cir. 1979) (bombed excavation equipment was not used in owner's business but had been manufactured several years earlier in another state, was currently being offered for sale in a nationwide trade newspaper, and was insured by a company doing business in several states); *United States* v. *Schwanke*, 598 F.2d 575 (10th Cir. 1979) (cafe in target building sold candy, gum, and vegetables from another state); *United States* v. *Sweet*, 548 F.2d 198 (7th Cir.), cert. denied, 430 U.S. 969 (1977) (liquor in destroyed tavern originated out-of-state even though it was purchased from a local distributor). Because Leisure's car was actually used in a business that affects interstate commerce, the conclusion that its destruction constitutes an offense within Section 844(i) follows *a fortiori* from the cited precedents.

authorized by the warrant,[4] which was for components of a destructive device. At petitioner's request, a friend had rented the apartment for him in a fictitious name in April 1981, paying in cash for six months' rent in advance (Pet. App. A5). Cars purchased in a fictitious name for co-defendant Schepp, as well as petitioner's own car and one registered to his brother, were seen parked in front of the apartment during the spring and summer of 1981 (*id.* at A5-A6).

Even assuming arguendo that the agents exceeded the scope of the authorized search when they dusted the apartment for fingerprints, the court of appeals correctly concluded (Pet. App. A11) that any error in admitting petitioner's fingerprint was harmless because petitioner testified at trial that he had visited the apartment on several occasions. There is no merit to petitioner's argument that he was forced to testify in order to explain the fingerprint, because there was ample evidence apart from the print that connected petitioner to the apartment (see *id.* at A5-A6). In light of this evidence and his own testimony, petitioner cannot reasonably claim prejudice from admission of the print.[5]

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[4]Probable cause for the warrant was based in part on the discovery of materials related to the manufacture of a bomb and remote control device in a communal trash bin located on the grounds of the apartment complex (Pet. App. A6). Petitioner no longer presses his arguments, properly rejected by the court of appeals (*id.* at A7-A11), that the search of the trash bin was improper and that the affidavit submitted in support of the warrant was insufficient to support a finding of probable cause.

[5]In any event, the search was proper because the apartment appeared to have been abandoned by the time it was searched in August 1981. There was no food in the refrigerator and no clothing in any closet. While there was some furniture and a bed, there were no pillows or sheets on the bed. Suppression Hearing Tr. 78-82. Moreover, clothing, food, and various other items had been found in a bag in a communal trash bin outside the apartment, along with mail addressed to the

c. Finally, petitioner contends (Pet. 12-14) that the district court erred in refusing to grant a mistrial after the prosecutor improperly stated during closing argument that Leisure was not called as a witness because he was a "gangster." The court of appeals' conclusion (Pet. App. A13-A14) that the district court acted within its discretion is plainly correct. Although the comment may have been improper,[6] the district court's prompt actions in sustaining petitioner's objection and admonishing the jury "to disregard the comment in its totality" (*id.* at A14) cured any error. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644 (1974). The court of appeals further noted (Pet. App. A14) that the strong evidence against petitioner (see *id.* at A4-A7) and the jury's lengthy deliberations also indicate that petitioner received a fair trial. Moreover, the comment here was not directed at petitioner, his witnesses, or his counsel. Cf. *United States* v. *Lane*, 698 F.2d 900 (7th Cir. 1983). Any error in the prosecutor's remark was accordingly harmless. See *United States* v. *Hasting*, No. 81-1463 (May 23, 1983).

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apartment (III Tr. 34-43; see also Pet. App. A6). This was ample evidence from which the agents could reasonably conclude that the apartment had been abandoned, and is consistent with the testimony at trial that petitioner had said to a friend that the apartment "had been wiped clean" and that "there was nothing there" (Pet. App. A7). See, *e.g.*, *Mullins* v. *United States*, 487 F.2d 581 (8th Cir. 1973); see also *United States* v. *Hunter*, 647 F.2d 566 (5th Cir. 1981) (per curiam). Accordingly, petitioner lacked the legitimate expectation of privacy necessary to support his Fourth Amendment claim. *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *Abel* v. *United States*, 362 U.S. 217 (1960).

[6]The "invited response" issue presented in *United States* v. *Young*, cert. granted, No. 83-469 (Feb. 21, 1984), is not raised by the instant petition, as the court of appeals found that the comment here was not responsive to defense counsel's closing argument (Pet. App. A13). Moreover, unlike in *Young*, there was here a timely objection that produced a prompt curative instruction. There is thus no need to hold this petition pending a decision in *Young*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1984

DOJ-1984-07